

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 98-0192 CS
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIOD: FEBRUARY 19, 1998**

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ISSUE

I. Controlled Substance Excise Tax – Imposition

Authority: U.S.C.A Const.Amend. 5; IN. Const. Article 1, Section 14; IC 6-7-3-5; IC 35-41-5-2; Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995); Blockburger v. United States, 284 U.S. 299 (1932); Garcia v. State, 686 N.E.2d 883 (Ind.App. 1997)

Taxpayer protests the imposition of the controlled substance excise tax.

STATEMENT OF FACTS

On August 10, 1996, taxpayer was arrested for dealing in controlled substances. On January 14, 1997, taxpayer was sentenced under two counts of Conspiracy to Deal in a Controlled Substance. The Department was notified by the Prosecutor’s Office on February 17, 1998. The Department assessed the controlled substance excise tax (CSET) against the taxpayer on February 19, 1998. The assessment was based on taxpayer’s possession of controlled substances. The taxpayer protested the assessment. Additional information will be provided below, as necessary.

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DISCUSSION

Pursuant to Indiana Code Section 6-7-3-5:

The controlled substance excise tax is imposed on controlled substances that are:

- (1) delivered,
- (2) possessed, or
- (3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.

Upon information obtained from the County Prosecutor's Office, the Department assessed the controlled substance excise tax against the taxpayer.

At the administrative hearing, taxpayer argued the controlled substance excise tax violated the principles of double jeopardy. U.S.C.A Const.Amend. 5, IN. Const. Article 1, Section 14. Taxpayer bases that claim on the fact he was taxed on the same controlled substances involved in his criminal prosecution for conspiracy to deal in a controlled substance.

In Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995), Indiana's Supreme Court found a controlled substance excise tax assessment was a punishment for purposes of double jeopardy analysis. Bryant at 298.

The question remains: when the taxpayer has violated two statutes with only one act has he committed two offenses or only one? The United States Supreme Court addressed this specific double jeopardy issue in Blockburger v. United States, 284 U.S. 299 (1932). In Blockburger, the Court stated,

Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Blockburger 284 U.S. at 304.

The Court of Appeals of Indiana applied the Blockburger analysis to facts similar to the ones before us. Garcia v. State, 686 N.E.2d 883 (Ind.App. 1997), involved a taxpayer who had been assessed the controlled substance excise tax and was then criminally convicted of dealing and possessing marijuana. Ultimately, the court held, "In order to assess the CSET on Garcia, the State was not required to prove any additional facts other than the elements of the possession and dealing crimes themselves." Garcia, 686

N.E.2d at 885. Garcia's criminal prosecutions constituted a second jeopardy.

However, after close study of the elements involved in this case, taxpayer's facts are distinguishable
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from Garcia. Taxpayer was convicted of Conspiracy to Deal in a Controlled Substance, a Class A felony. Indiana Code section 35-41-5-2 states in part:

- (a) A person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony...
- (b) The state must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement...

The controlled substance excise tax was assessed against the taxpayer for possession of controlled substances. The conviction for conspiracy to deal did not rely on possession as an element of the crime. The conspiracy elements included intent to enter an agreement and an overt act in furtherance of the agreement. Garcia is distinguishable because both Garcia's criminal convictions and the tax assessment were based on possession.

FINDING

Taxpayer's protest is denied. Taxpayer has failed to prove the controlled substance excise tax was assessed in violation of the double jeopardy protections provided by the U.S. and Indiana Constitutions.